



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/736,037	12/15/2003	Carrie Melinda Kincaid	77005	4023
48940 7590 04/12/2007 FITCH EVEN TABIN & FLANNERY 120 S. LASALLE STREET SUITE 1600 CHICAGO, IL 60603-3406			EXAMINER PADEN, CAROLYN A	
			ART UNIT 1761	PAPER NUMBER
SHORTENED STATUTORY PERIOD OF RESPONSE		MAIL DATE	DELIVERY MODE	
3 MONTHS		04/12/2007	PAPER	

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

## Office Action Summary

Application No.

10/736,037

Applicant(s)

KINCAID ET AL.

Examiner

Carolyn A. Paden

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 12 March 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-33 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-33 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.

- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 4-11, 14-18, 21, 24 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bower (3,366,494) for reasons of record.

Applicant argues that Bower is a foam, but the foam of Bower could also function as a spread. Applicant argues that the density of a spread is different from that of a foam. But no unobvious result is seen from the difference between the density of the Bower product and the density of the claimed product. Applicant argues that the microcrystalline cellulose in Bower is used as an emulsifier. But it is well known in the art that food ingredients can have dual functions. Applicant argues that, upon dilution with raspberry puree, microcrystalline cellulose would fall far short of the amount of required fiber. This has been considered but does not overcome the rejection because raspberry puree would be expected to contribute additional plant fiber to the product. Applicant argues that the raspberry puree fiber would add too much fiber to the product. This has

been considered but is not persuasive because the raspberry puree would be expected to have water in it as well as fiber. Applicant urges that the products are different from applicants' invention, but the claims are rejected as being obvious over Bower and not identical to it. Applicant urges that there is no incentive to modify Bower. But Bower provides a selection of different modified edible examples, which encourage product modification.

Claims 2, 3, 9, 12, 13, 19, 20, 22, 23 rejected under 35 U.S.C. 103(a) as being unpatentable over Bowers as applied to claims 1, 4-8, 10, 11, 14-18, 21, 24 and 25 above, and further in view of Musser.

Applicant argues that it would not be obvious to include chocolate in the Bower formulation. But Bower, at column 5, lines 60-67, contemplates a variety of additional foods of varying formulations and densities. Applicant argues that chocolate would not be expected to form the emulsion of Bower. This has been considered but is not persuasive because chocolate is a minor ingredient and water or milk are major ingredients in the product of Musser.

Claims 26-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bower in view of Musser as applied to claims 1-25 above, and further in view of Food Engineering Article.

Applicant argues that Food Engineering does not provide the details of the container. It is appreciated that a "floating plunger" is not mentioned. The container system relies on pressurized gas injected below the piston head. There would be no technical reason to attach the plunger to any part of the container because the plunger is maintained in place by gas pressure. So one of ordinary skill in the art would expect the plunger to be a floating plunger. Applicant urges that there would be no reason to include the foods of Bower or Musser in the container of Food Engineering. This has been considered but is not persuasive because Food Engineering provides an economic reason to modify the container construction, which is that the contain assisted in improving product sales.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on (571) 272-1398 or by dialing 571-272-1700. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on

Application/Control Number: 10/736,037  
Art Unit: 1761

Page 6

access to the Private PAIR system, contact the Electronic Business Center  
(EBC) at 866-217-9197 (toll-free).

*Carolyn Paden*

CAROLYN PADEN 1761  
PRIMARY EXAMINER 4-11-07